course of his able argument. First, were the appellants granted the tenancy? Secondly, was a payment of a premium required as a condition of the grant of that tenancy? Thirdly, was the premium paid as a result of an agreement entered into between the appellants and the respondent that it should be so paid as a premium required as a condition of the tenancy? Fourthly, was it so required and received by the respondent? The answers to each and every one of those questions is in the affirmative.

It was said that the respondent was simply employed by His Highness the Sultan as a rent collector and that it was His Highness, and His Highness alone, who had power to grant tenancies. That, of course, is perfectly true, but the fact remains that the respondent at all material times in this case held himself out to the appellants as the agent acting on behalf of the Sultan and that he was in a position to obtain a grant of these premises on payment of a premium.

According to the evidence of the principal witnesses for the appellants the respondent said that he knew of a place in Jalan Tan Hiok Nee and that compensation was required to be paid. He added that it was the Sultan's property and that he was acting as agent for the Sultan. It is abundantly clear upon the evidence that he held himself out as empowered, subject to the formal permission of His Highness the Sultan, to make such a grant, that the compensation or premium was paid on the strength of that holding out and that the holding out was in fact subsequently ratified in that a grant was approved of the premises to the appellants. It seems to me immaterial as to whether the landlord himself received the premium or whether the respondent, purporting to act as agent, received it and put it in his pocket. The crucial question, was in my view: was a premium required and received as a condition for the grant of the premises to the appellants? And the answer to that question was clearly in the affirmative. As Viscount Simonds said in the course of his opinion in *Elmdene Estates Ltd.* v. *White*[2]:—

> "My Lords, it has been said before, and it must be said again, that in the consideration of questions arising under the Rent Acts the court must look at the substance and reality of a transaction, not its form:"

It seems to me abundantly clear upon the evidence that the respondent demanded and received an unlawful consideration from the appellants and that that consideration or premium is clearly recoverable under the provisions of section 4(2) of the Control of Rent Ordinance.

I too would allow this appeal with costs.

Appeal allowed.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

PUBLIC PROSECUTOR v. TAN KOOI CHOO

[C. A. (Thomson C.J., Hill J.A., Hepworth J.) November 24, 1960]

[Penang — F.M. Criminal Reference No. 4 of 1960]

Criminal Law — Penal Code, s.381 — Theft — Inference from facts.

This was a reference to the Court of Appeal under section 34(1) of the Courts Ordinance, 1948, as to whether theft was committed in the following circumstances: the appellant, an employee of the Penang Port Commission had been given two packets of tea within the Penang Port Commission Area by a servant of the consignee before they had been cleared. There was no evidence to show that the servant of the consignee did or did not have the permission of his employer, the consignee, to give away small quantities of damaged packets of tea.

Held: in the circumstances, it could not be necessarily inferred that theft was committed.

Semble: the fact that the Penang Port Commission suffered no loss does not mean that the respondent did not cause a wrongful gain to himself.

COURT OF APPEAL (REFERENCE).

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the appellant.

Lee Thean-Chu for the respondent.

Hepworth J.: In this case the respondent had been charged in the Sessions Court, Penang, as follows:—

> "You are charged that you on the 17th day of June, 1960 at about 11.00 a.m. at the Penang Port Commission premises, Penang, being employed in the capacity of a servant of the Penang Port Commission committed theft by stealing certain property, to wit, 2 packets of tea and loose leaves amounting to the value of $2 in the possession of the said Penang Port Commission and that you have thereby committed an offence punishable under section 381 of the Penal Code".

In the event the prosecution case was confined to the 2 packets of tea only.

At the end of the trial the learned President found the respondent not guilty and acquitted him. From this decision the Public Prosecutor appealed.

On the hearing of the appeal by Rigby J., in the High Court, Penang, the learned Judge allowed the appeal, convicted the respondent of theft as charged, and sentenced him to one month's imprisonment.

The basis of the learned Judge's decision was that the evidence appeared to him to be irresistible that the respondent knew perfectly well that he was not entitled to accept the tea at the time and in the circumstances disclosed by the evidence, and that in doing so he intended to take dishonestly the tea out of the possession of his employers, the Penang Port Commission.

However the learned Judge felt that it was of considerable public importance that it should be decided by the Court of Appeal whether the inference he had drawn from the evidence was a necessary inference. Accordingly the learned Judge referred the question to the Court of Appeal under section 34(1) of the Courts Ordinance, 1948. The terms of the reference were as follows:—

"Whether, upon the facts of the case as accepted by the trial Court and accordingly by the appellate Court, — namely, that the appellant, an employee of the Penang Port Commission, had been given the two damaged packets of tea within the Penang Port Commission area by a servant or agent of the consignee before they had been cleared — the appellate Court was right in law in drawing, as a necessary inference, the conclusion that the appellant had committed the offence of theft (as distinct from, at its worst, a mere disciplinary offence against his employers), in that he had intentionally taken dishonestly the two said packets of tea out of the possession of the Penang Port Commission".

The learned Judge accepted in general the learned President's findings of fact and accordingly the answer to the reference will have to be based upon the learned President's findings of fact.

I do not think it is necessary for me to refer to the evidence in detail or to all the learned President's findings of fact. I would however like to refer to one finding which I consider vital, and that is his finding appearing at both page 26 and page 27 of the Record that D.W. 3 was an honest and truthful witness.

D.W. 3 was an employee of the consignee of the tea the subject of the charge. D.W. 3 said that he picked up the 2 packets of tea, Exhibit P. 1, which were part of his firm's consignment, from the floor of the wharf by a crane some 50 feet away from the crane at which the respondent was working. He then walked over to the respondent and gave him the 2 packets. On his own evidence, when originally offered the packets of tea, the respondent said:—

"I refused because I might be in trouble . . . . I told him I did not want the 2 packets".

The owner of the tea, the consignee, D.W. 3's employer, did not ask for a survey of the relevant consignment (this appears at page 10, line A2 of the Record) and accordingly there was no loss to the Penang Port Commission.

Two points arise as a result of this evidence. Firstly was it not D.W. 3 who took the tea out of the possession of the Penang Port Commission and not the respondent? Secondly was there any evidence to show that D.W. 3 did or did not have the permission of his employer, the consignee, to give away small quantities of damaged packets of tea ?

In my view it was D.W. 3 who took the tea out of the possession of the Penang Port Commission and there was nothing to show that D.W. 3 did not have his employers permission in such circumstances to give away small quantities of tea. That he may well have had such permission is supported by the fact that no survey was asked for by the consignee, presumably because the quantity of the consignment which was damaged was so negligible.

The fact that the Penang Port Commission suffered no loss does not of course mean that the respondent did not cause a wrongful gain to himself. But in the light of the evidence, or its limitations, can it be said that the necessary inference is that the respondent had committed the offence of theft? Has it been shown as a necessary inference that his intention in taking the tea was dishonest? It is to my mind not a necessary inference. He was given no opportunity to say what he meant by the words, to which I have already referred, which he spoke when originally offered the packets of tea. Could not the trouble to which he referred have been a reference to a breach of the regulations of the Penang Port Commission which would result in disciplinary action? If that was so can it be said that the charge has been proved beyond reasonable doubt? I do not think it can. If D.W. 3 had his employer's permission to give away small quantities of a consignment a negligible quantity of which had been damaged, it would not be an unreasonable inference that the respondent had no dishonest intention when accepting the 2 packets of tea, even if he knew he was committing a breach of the regulations of the Penang Port Commission. We do not know if D.W. 3 had such permission and in those circumstances a doubt must have remained the benefit of which should have been given to the respondent.

I would therefore answer the reference in the negative, and would dismiss the appeal.

Reference answered in the negative.

HO CHOOI SOON v. THE INDIAN OVERSEAS BANK LTD.

[C. A. (Thomson C.J., Hill J.A. and Hepworth J.) November 25, 1960]

[Penang — F.M. Civil Appeal No. 12 of 1960]

Practice and Procedure — R.S.C. O.14 — Appeal against order giving leave to defend.

This was an appeal (from the decision of Mr. Justice Rigby reported in [1960] M.L.J. 286) against an order giving leave to defend.

Held: (1) the Court of Appeal would not interfere in such a case unless special circumstances are shown;

(2) there were no special circumstances in the present case.

Cases referred to:—

(1) *Wing* v. *Thurlow* 10 T.L.R. 151.

(2) *The Electric & General Contract Corporation* v. *The Thomson-Houston Electric Co.* 10 T.L.R. 103.

COURT OF APPEAL.

Lee Thean-Chu for the appellant.

R. D. Hume for the respondents.

Thomson C.J. (delivering oral judgment): This somewhat curious appeal is from a decision of Mr. Justice Rigby.

The plaintiff, the present appellant, issued a writ against the defendant bank on 22nd September, 1959. The claim was for a sum of $3,243.87 and the writ was specially endorsed under Order 14. In due course the Registrar gave the plaintiff leave to sign final judgment and the defendants appealed against that decision to the Judge who allowed the appeal and gave unconditional leave to defend.